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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, ET AL., *Petitioners,*

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, ET AL., *Respondents.*

On Writ of Certiorari to the Supreme Court of Washington

BRIEF AMICI CURIAE

For the National Council of Jewish Women; the Union of American Hebrew Congregations, Commission on Social Action; the International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW); the United Mine Workers of America (UMWA); the International Union, American Federation of State, County and Municipal Employees, AFL-CIO; the United Farm Workers of America; the Massachusetts Institute of Technology; Robert C. Wood, President, University of Massachusetts; the United Negro College Fund, Inc.; the Americans for Democratic Action; the Center for Community Change; the Center for National Policy Review; the Japanese Americans Citizens League; the National Urban Coalition; the National Urban League; the Southern Christian Leadership Conference; the University of Notre Dame Center for Civil Rights; and the Children's Defense Fund of the Washington Research Project, Inc.

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INTRODUCTION

We present this brief in support of the respondents with the consent of counsel for both the petitioners and the respondents.

We rely on the respondents' treatment of this Court's jurisdiction, of the opinions below and of the constitutional and statutory provisions involved.

QUESTION PRESENTED

Whether the Fourteenth Amendment of the United States Constitution forbids a discretionary admissions process whereby a State University Law School affirmatively seeks qualified students from racial minority groups, when such groups have long been victims of racial discrimination and had only token membership in the Law School and the legal profession.[1]

INTEREST OF AMICI

Amici—in the area of religious, labor union, university affairs, and civil rights as well as in the area of public policy—have a long standing involvement with issues of equal opportunity.

The Commission on Social Action, long dedicated to the promotion of equality of opportunity, is a joint

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[1] The constitutional question is the only one properly before this Court. The question under Title 42, U.S.C. 2000(d) was not presented to the trial Court in this case; thus it was not considered by the Supreme Court of Washington; and thus it may not be considered by this Court. See the Respondents' "Motion of Dismissal of Appeal or, in the alternative, Affirmance of the Judgment Below and Statement in Opposition to Certiorari," at page 2, footnote *.

Even if the question under Title 42, U.S.C. 2000(d) were properly before this Court, the claim of petitioners would have no merit. The statute must be interpreted in light of the Department of Health, Education and Welfare Regulations drawn to enforce it. *Lau* v. *Nichols*, 42 U.S.L.W. 4165. Those regulations quite plainly approve affirmative admissions policies such as that adopted by the University of Washington Law School. See 38 F.Reg. 17,979; § 80.3(b)(6)(ii).

instrumentality of the institutions of Reform Judaism in America, including the Union of American Hebrew Congregations and the Central Conference of American Rabbis. The UAHC is the central body of Reform Judaism, serving 710 synagogues throughout the country with a membership of approximately one million persons.

The National Council of Jewish Women was established in 1893 and has consistently maintained an interest in civil rights. It is one of the organizations that has strongly supported civil rights legislation and is continuing to monitor the enforcement of the civil rights laws.

The UAW is the largest industrial union in the world, representing approximately a million and a half workers and their families. Including wives and children, UAW represents more than 4½ million persons throughout the United States and Canada. The UAW, which is deeply committed to equal opportunity and anti-discrimination, does much more than bargain for its members. It is active in civic affairs and citizenship and legislative activities. It is by mandate of its Constitution and tradition deeply involved in the larger issues of the quality of life and the improvement of democratic institutions. The questions presented by this case vitally affect the UAW and its members.

The United Mine Workers of America is a labor organization representing coal miners. Throughout the United States the UMWA has historically been in the forefront of the nation's struggle for equal opportunity employment and is dedicated to the principle of equal opportunity in every walk of American life.

The International Union, American Federation of State, County and Municipal Employees, AFL-CIO, is

a labor organization with a membership of more than 650,000 persons, almost all of whom are employed by state and local governments throughout the nation. AFSCME is deeply concerned about the achievement of equality in America. Its members, as public employees both white and black, are committed to the principle of affirmative action and are particularly conscious of the importance of affirmative action toward equal opportunity by public institutions.

The United Farm Workers of America is an unincorporated association which functions as a trade union on behalf of farm workers. In addition to its interest in wages, hours, and working conditions, it is vitally interested in the social betterment of its members and particularly in their obtaining higher educational opportunities.

As a means to assure the equality of opportunity in the professions and career pursuits in our society, the Massachusetts Institute of Technology is committed, through its student recruitment policies and through its educational program, to increasing the interest, preparation and availability of minorities for careers in science and technology.

Robert C. Wood is President of the University of Massachusetts, a public, state-supported educational institution of 30,500 students with campuses at Amherst, Boston and Worcester, Massachusetts. Dr. Wood was formerly Under Secretary and Secretary of the United States Department of Housing and Urban Development, and was also Director of the Joint Center for Urban Studies of M.I.T. and Harvard. As a University President, Dr. Wood now has had special experience with, and concern for, efforts to ensure equal opportunity in the admissions process.

The United Negro College Fund, Inc., is an organization consisting of 41 member colleges, all but one of them in the South, which was established in 1944 to raise funds and provide other assistance to member colleges. The Fund is vitally concerned to ensure equality of opportunity in admissions to graduate and professional schools.

The Americans for Democratic Action, founded in 1947, is an organization of individuals that has devoted itself to the cause of civil rights for all. Over the past two decades, it has worked for the enactment of civil rights legislation and for the promotion of equal opportunity through every branch of government.

The Center for Community Change, incorporated in 1968, is a District of Columbia non-profit corporation. Among its purposes are activities aimed at "improvement of the condition of the poor, the underprivileged and the alienated." The Center's work with dozens of community organizations representing minorities has made it aware of the effects of past discrimination and the need for affirmative actions to aid its victims.

The Center for National Policy Review on race and urban issues is a public interest law center located at Catholic University Law School and supported by foundation grants. Since 1970, the Center has provided assistance to civil rights and other public interest organizations seeking fair and vigorous implementation of Federal laws designed to protect the rights and interests of racial minorities. The Center's help takes the form of research, technical assistance and legal representation in rule-making or other Federal agency proceedings. In employment, education, housing and other areas the work of the Center has been directed toward the adoption by Federal agencies of

affirmative action policies to undo the effects of past racial discrimination. The Center also maintains a legal intern program where students from several law schools have an opportunity for practical as well as academic involvement in civil rights issues. This program and the overall objectives of the Center have benefitted substantially from the participation of minority law students.

The Japanese American Citizens League (JACL) is a national organization comprised of 96 local chapters with over 27,000 members in 32 states. Since its official organization in 1930, JACL has been dedicated to the promotion of the welfare of its members and to the broader goal of the protection of the rights of all Americans. Having suffered through one of the most intense periods of discrimination in the modern history of the United States—the exclusion of over 100,000 persons of Japanese ancestry from the West Coast during World War II—Japanese Americans are acutely aware of the potentially invidious and unjust consequences of governmental programs based exclusively upon race. However, JACL is joining in this brief because it believes that it is imperative that affirmative efforts be made to increase educational opportunities for individuals who are disadvantaged in our society because they are members of minority races that have been traditionally discriminated against and denied access to the advantages of American society.

The National Urban Coalition is an organization whose purpose is to improve opportunities and conditions of life for citizens living in urban areas of the nation. Founded in 1967, it has 32 affiliated local coalitions and representation from corporations,

unions, religious, and civil rights organizations. The improvement of educational opportunity is among its prime purposes and to that end it has sponsored educational research and participated as *amicus curiae* in cases involving the equal distribution of educational resources.

The National Urban League, Inc., is a charitable and educational organization organized as a not-for-profit corporation under the laws of the State of New York. For more than 63 years the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, by fostering better race relations and increased understanding among all persons, and by implementing programs approved by the League's interracial board of trustees. The League has concluded from its experience in manpower training, placement of minority professionals, and other employment related programs that special measures are usually required to overcome the damage done by long-term racism and prejudice. The selection process used by the University of Washington Law School to ensure reasonable representation of minorities among its students and, ultimately, the legal profession is consistent with the methods and goals of the League to purge society of the effects of discrimination. The League joins in this brief in the belief that it will further its long-standing goals.

The Southern Christian Leadership Conference was established in 1958 by Dr. Martin Luthern King, Jr. In the ensuing years, SCLC has taken a prominent role in support of civil rights, both in the South and throughout the nation. It is committed to equal

opportunity in education at all levels, including graduate and professional schools.

The University of Notre Dame Center for Civil Rights was established in 1973 to continue in the private sector the commitment toward achieving equality for all Americans which the Reverend Theodore M. Hesburgh, C.S.C., President of the University, pursued for fifteen years as a member and then Chairman of the United States Commission on Civil Rights. The Center for Civil Rights is a resource for research into the United States' recent civil rights history; it engages in analysis of current civil rights issues, and it attempts to recommend viable solutions to civil rights problems. The Center is intimately familiar with the history and current extent of discrimination in this country and the legal and moral issues involved in eradicating this blight. The Center, moreover, is associated with a major university and is directly interested in ensuring that universities retain the administrative flexibility to undertake effective affirmative action to enroll and educate minority group students. It regards this case as probably the most important civil rights case to reach this court since *Brown* v. *Board of Education*. The following members of the Advisory Council of the Center for Civil Rights join in support of this brief: Reverend Theodore M. Hesburgh, Chairman; Berl I. Bernhard, partner in law firms in Washington, D.C., New York and former Staff Director of the U.S. Commission on Civil Rights; Marian Wright Edelman, Director of the Children's Defense Fund; Oscar Garcia-Rivera, Professor, Hofstra Law School and Chairman of Aspira of New York, Inc.; Earl G. Graves, Earl G. Graves Publishing Company; M. Carl Holman, Presi-

dent, National Urban Coalition; Kenneth Keniston, Professor, Yale University; Burke Marshall, Deputy Dean, Yale Law School; William May, Chairman of the Board, American Can Company; Grace Olivarez, Director, Institute for Social Research and Development, University of New Mexico; William L. Taylor, Center for National Policy Review and former Staff Director, U.S. Commission on Civil Rights; Professor Lester C. Thurow, Massachusetts Institute of Technology; Harris Wofford, President, Bryn Mawr College; and Howard A. Glickstein, Director of the Center, and former General Counsel and Staff Director of the U.S. Commission on Civil Rights.

The Children's Defense Fund of the Washington Research Project, Inc., was established in 1968. Its principal aim is to assist in achieving equality of opportunity for all citizens through litigation and negotiation and monitoring of administrative agency programs. The Project has long been deeply concerned with educational issues, particularly with alleviating the continuing effects of racial discrimination in public schools. It has conducted a number of studies of federal desegregation policies and the impact of federal aid to education programs, relating to higher education as well as primary and secondary education, to ensure that the national commitment to end discrimination is fulfilled. In 1973, the Project complemented these efforts with a broader focus on children's rights, seeking systematic reforms on behalf of all the nation's children, but with special attention to the special problems of minority and poor children. The Project's work to vindicate the rights of all children depends, first, on eliminating the vestiges of discrimination against particular children at all levels of public education.

STATEMENT OF THE CASE

This is not a racial "quota" case. Nor does it involve "reverse discrimination." The facts of this case are a good deal more complex.

When in the Summer of 1971, the Petitioner—along with about 1,300 others—was denied admission to the University of Washington Law School, he brought this lawsuit. At issue now is the School's traditionally discretionary admissions process, used to seek students from racial minority groups. Before setting out the elements and application of that process, it is worthwhile to describe the chain of events, adduced at trial, that led the Law School to adopt it and that led the Petitioner to attack it.

A.

The Petitioner, Marco DeFunis, twice applied, in 1970 and 1971, for admission to the University of Washington Law School. Twice he was denied admission. Both times he applied to other nearby law schools as well. Both times he was admitted to other law schools, in the State of Oregon and in the State of Washington. (St.[2] 13, 21, 23.) But DeFunis preferred the University of Washington. (St. 21.) He set about to challenge its decision not to admit him.

In June of 1971, DeFunis' parents obtained counsel and contacted the Law School Admissions Committee. They submitted letters from DeFunis' mother and doctor indicating that he had been ill at the time he

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[2] "St." refers to the Statement of Facts, the portion of the record before this Court containing the transcript of the proceedings before the King County Superior Court.

took the first of three Law School Aptitude Tests. They did not, so far as the record shows, even mention the Law School policy toward racial minorities. The Admissions Committee gave special reconsideration to DeFunis' application; but it reaffirmed its decision not to admit him. (St. 355-356.)

At about the same time, DeFunis' parents, accompanied by counsel, arranged a meeting with members of the University Board of Regents. Again, so far as the record shows, they did not mention the University's policy toward racial minorities. Rather, they "explained . . . what good grades [DeFunis] had had and how [he] applied and had been turned down or put on the waiting list, and one thing and another, and just asked the regents to consider the situation and see what, if anything, they could do about it." (St. 115.) As a result of this meeting, members of the Board of Regents met with representatives of the Law School to discuss DeFunis' application, but they came away "satisfied" with the Law School's decision not to admit DeFunis. (St. 116.)

Not long thereafter, DeFunis brought suit against the University in the King County Superior Court. Again, his main argument was that, on the basis of his grades and test scores alone, he deserved admission to the Law School. His counsel told the Superior Court: "We are not really attacking a minority program. Our position here is that the law school is admitting students . . . with lower grades and lower qualifications than the plaintiff in this case . . . We care not whether [those admitted with lower grades and scores] are minority students or whether they are not minority students, and some of them are not. . . . Why are we concerned with the efforts of the University to in-

augurate some minority program for minority students, I don't know. I do not believe that it is what we are talking about in this trial." (St. 230.)

Nevertheless, the trial soon did focus on the University's affirmative policy to seek students from racial minorities. The Superior Court held that policy to be unconstitutional. It ordered the Law School to admit DeFunis. The Supreme Court of Washington reversed this holding and order. But, on June 5, 1973, Mr. Justice Douglas stayed execution and enforcement of its judgment; and DeFunis is now in his third year at the University of Washington Law School.

B.

The racial minority policy, now the crux of this case, is not one confined to this Law School or to this University. It was not adopted suddenly; nor was it adopted only recently. Rather, it is a University-wide policy, similar to policies at Universities all over the country, adopted voluntarily, after careful thought and study, almost ten years ago. At trial, University President Charles Odegaard testified about its genesis.

When Odegaard became the President of the University of Washington in 1958 he encountered a "claim of religious discrimination [in University admissions], and there were references, also, to racial [discrimination]." (St. 221.) After a review of the problem, the University issued a general statement committing itself to an entirely "non-discriminatory" admissions policy, "what I suppose you would call an open-door." (St. 222.) President Odegaard testified

that "most of us, at the time, felt that the University policy was clear and was sufficient as it was announced in 1959." (St. 222.)

But several years later, as the eyes of all Americans opened to the lasting damage done by more than two centuries of discrimination against racial minorities, President Odegaard saw the matter differently. He testified:

> "At Commencement in 1963, . . . a large number of students, [from] all the schools and colleges granting degrees at the University, . . . filed by. I walked out with the regents following immediately after me, and we went into the area where we changed from academic garb to conventional street clothes. As soon as we got in there, the question was raised— . . . 'Where are the black students? Where are the black students?' There were so few that appeared . . . With our open-door policy, we had so few that seemed to be coming through. If they cannot go through these halls and acquire the kind of educational background required for many of the roles in society, they obviously are not going to share more fully in the American way of life and feel a part of the society into which they have been born."

(St. 222-223.)

Shortly after the 1963 Commencement, President Odegaard appointed a faculty committee to determine why the University of Washington had no more than a few students from racial minority groups and what could be done about it. (St. 223.) It became clear that, despite the University's non-discriminatory posture, minority students were still being excluded because of past discrimination against them in almost

every institution of the society. President Odegaard testified:

> [M]ore and more as we dug into this, we began to realize that there can be a presumption of legal equality or procedural equality at the University but, in fact, [there are] cultural conditions [i.e., present effects of past discrimination] . . . which deter certain persons from acquiring the backgrounds necessary to move into more responsible roles in American life.
>
> So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.
>
> Meanwhile, in the United States of America, there was developing, also, an awareness that something more was needed, and I think the language—we didn't think it up in the beginning—I think it is now the national parlance, 'affirmative action' . . . ."

(St. 223-225.) In 1965 the faculty committee issued its report recommending a more affirmative policy to remedy the exclusion of minorities from the University. (St. 228.)

Between 1965 and 1968 the University began to institute its new policy. In cooperation with the federal Upward Bound Program, the University brought minority "high school students . . . to the campus for eight weeks' special classes." (St. 228.) Many students "were admitted to the University on the basis of what was learned about them, even though, in some

instances, their previous academic records would not have suggested that they were within the conventional limits. . . . [S]o there was the beginning of more discretionary admission in the sense of taking into account . . . data gained by larger measures of personal contact [with minority applicants], awareness of [their] history, [their] motivations and [their] attitudes . . . ." (St. 229.)

C.

The University-wide policy toward racial minorities was adopted by the Law School. The minority groups to which the Law School applied its policy were "Black Americans, Chicano Americans, native Americans, or Indians, and Philippine Americans." (St. 351.) The basis of the selection was that these racial minorities had been subject to pervasive discrimination in America and had had only token membership in the Law School and the legal profession previously; Asian Americans (other than Philippine Americans) were not included because of the "large number of Asian American applications and the significant number that had been accepted in the process of simply the ordinary review of the files." (St. 352.)

The minority policy did *not* represent a sharp break, in method, with the admissions policy applied to other applicants:

> "The policy recognized there was need for [a] large policy of discretion in review of individual cases . . . . That is not something new in the University; the University has always pursued a policy of, in addition to using the conventional credentials, to recognize there may be other information about a candidate which suggests he should or should not be admitted. This is true

> for conventional white students, as well as students from minority backgrounds."

(St. 241.)

The Law School advised applicants that admissions—for minorities and non-minorities alike—were based on considerations other than just grades and test scores. In addition to grades and scores, the School asked them to submit personal recommendations from the Dean of Students or other official of their college, from a faculty member in their major subject, and from anyone else they might wish. (St. 338-339.) And the School specifically stated that applicants would be evaluated "on the basis of their ability to make significant contributions to law school classes and to the community at large." 507 P.2d 1169, 1173.

The School's Admissions Committee treated grades and test scores as important, but as only two of several factors, within a "discretionary" process applied to *all* applications. Initially, it did rank applications into three categories according to their Predicted First Year Averages (P.F.Y.A.), a figure based only on the grades and scores. But this categorization alone did *not* determine acceptance or rejection.

The Admissions Committee reviewed applications showing a P.F.Y.A. over 77 or below 74.5 soon after they came in.[8] Even then, however, it considered much

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[8] The full Admissions Committee reviewed applications in the top category "in groups of 25 or 30" as they were received during the year. (St. 340.) It "delegated" to its Chairman, Professor Richard O. Kummert, the responsibility to make a preliminary review of applications in the bottom category. (St. 340-341.) The "delegation" to the Chairman "did not run to those files presented by minority students" in that category. "Essentially, the committee reserved to itself consideration of all minority files." And all minority applications below the top category were deferred for full review later on, in May. (St. 341.) See text below.

more than the applicants' P.F.Y.A.'s. There was no automatic decision based on numerical criteria. The Committee gave advance acceptance to most in the top numerical category. But it also "deferred judgment on a number of these files." (St. 340.) It sent an advance rejection to many in the bottom numerical category. But in many "cases of doubt" showing qualifications beyond mere grades and scores it deferred these files, too, for later consideration. (St. 342.)

The Committee kept the middle category of applications—along with those deferred from the top and bottom groups—for evaluation in May. (St. 242.) At the time, it closely examined the applicant's qualifications,[4] including many non-grade-and-score considerations such as personal qualities, recommendations, community activities and past experiences. (St. 271, 278-287, 303). On this basis, the Committee finally determined which applicants to accept, which to reject and which to put on a waiting list.

The Committee subjected the applications of racial minority students to the same kind of "discretionary" process of evaluation. In fact, it deferred all minority applications, showing P.F.Y.A.'s below 77, for review in May. (St. 341.) And in May, it considered all of

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[4] Initially, as to the main body of "deferred" applications, the files "were divided and distributed among the committee members, essentially at random." (St. 344). The individual members reviewed the files assigned to them, then discussed them with the full Committee, and the full Committee "debated" about them and sought to reach a general "consensus" on each one. (St. 347.) Although minority applications were also considered by the full Committee, the administrative procedure applied to them at the initial stage was somewhat different. See footnote 5 below.

them together at one meeting.[5] (St. 353.) At that meeting, it put the applicants' P.F.Y.A.'s as well as their non-grade-and-score qualifications into the balance. In many cases, to be sure, it weighed these factors somewhat differently for minority applicants, giving somewhat more emphasis to non-numerical qualifications. The Dean of the Law School, Richard Roddis, testified that, "as to certain minority groups, the [admissions] committee evaluate[d] the qualifications of applicants separately and I think with less emphasis on the undergraduate grade point averages and the L.S.A.T. scores than they [did] with respect to the applicants of the majority groups." (St. 70-71.)

The Committee, however, did *not* abandon its basic standards in admitting minority applicants. (St. 241.) Rather, it continued to examine each one for his or her "probability of succeeding in law school." (St. 353.) For the policy was to give non-grade-and-score factors more weight only to the extent that "there is something in the record of [the] individual which suggests that he has the motivation and capacity . . . to . . . move out of the University at the same level or degree that all other students do . . . ." (St. 242.)

The Committee's exclusive focus, then, was on the overall qualifications of minority applicants. It did *not* have to meet any "quota." Rather, the Law School's policy was based simply on a hope that,

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[5] In May, the files of minority applicants were assigned, for initial review, to two Committee members with special experience and expertise in evaluating applicants with minority backgrounds. (St. 352.) These two members then discussed the minority applications with the full Committee, and the full Committee "debated" about them, as it also did with respect to non-minority applications. See footnote 4 above.

through additional efforts, it could find a "reasonable" number of qualified minority students, to remedy their unreasonable absence from the School in the past. (St. 353, 416, 420.) The number actually admitted thus depended on the qualifications of the individual applicants. The undisputed testimony of University officials at the trial in this case was that *every* minority student admitted was, indeed, qualified for law study. (St. 73, 233-234, 245, 399, 420.)

University officials recognized that *some* minority students chosen by the Admissions Committee presented a somewhat higher risk than *some* other students. But they felt that such relative risks were a normal part of the Law School admissions process, which explicitly based *all* admissions decisions in large part on a "discretionary" evaluation of non-grade-and-score considerations. (St. 234, 418, 423.)

The discretionary" nature of the Law School's admissions process—toward minority and non-minority applicants alike—was clearly revealed in the make-up of the group offered admission in 1971. Because the School did not judge *any* applications by college grades and test scores alone, many applicants were offered admission who had lower grades and/or scores than the unsuccessful applicant, DeFunis. The majority of them were *non*-minority students. Specifically, the Superior Court found that 38 admittees with lower P.F.Y.A.'s than DeFunis were from non-minority groups, while 36 were from racial minority groups (Finding XVI.)[6] Thus about one-quarter of the 300 applicants offered admission were "below" DeFunis

[6] Six of the minority students offered admission had P.F.Y.A.'s *higher* than the Petitioner's.

in terms of purely numerical criteria. Plainly, the Admissions Committee gave significant weight to non-numerical qualifications, and it did so in the cases of non-minority applicants just as in the cases of minority applicants.

Finally enrolling at the Law School in the Fall of 1971 were somewhat over 150 students. Among their number were 18 minority students. (Finding XVI.) Also among their number, pursuant to the court order in this case, was Marco DeFunis.

SUMMARY OF ARGUMENT

This case presents an issue far different from those presented in past "race cases" before this Court. For the University of Washington Law School takes cognizance of race not in order to burden racial minorities, but to remedy the effects of past discrimination against such minorities. The Fourteenth Amendment was never intended to frustrate such remedial efforts.

For this reason, it would be entirely inappropriate to apply the presumption of unconstitutionality, usually applicable to other forms of "racial classification," to this case. This Court has employed such a presumption only in cases involving the stigmatization or inferior treatment of an isolated minority group. The Court has not employed the presumption of unconstitutionality when, as in this case, a racial classification is used to remedy past discrimination.

Moreover, the Court should be particularly cautious in interfering with the Law School admissions process here, because the School's policy to remedy past *de facto* exclusion of minorities was voluntarily adopted. Our principles of federalism counsel judicial restraint.

This case, therefore, should be subjected to a test of "reasonableness"—a test strong enough to prevent "reverse discrimination," but flexible enough to allow efforts by State and local government authorities to remedy the effects of past discrimination. Under that test the University of Washington Law School's admissions policy toward minorities was surely constitutional.

The School's decision to initiate the policy was based on a reasonable perception of the problem of effective exclusion of minorities in the past. The policy was reasonably designed to solve the problem; and it was well within the limits of the School's proper educational concerns.

The scope of the School's policy was eminently reasonable. It was not a "quota." Rather, it involved only the weighing of individual minority students' qualifications within a traditionally discretionary admissions process. The School gave somewhat more weight to qualifications other than college grades and test scores in the cases of minority applicants. But, importantly, it carefully weighed such qualifications in the cases of *all* applicants, minority and non-minority alike; it did not judge *any* applicants by grades and test scores alone. Moreover, the basic standard of qualification for law study applied to minority applicants was no different from that applied to others; every minority student finally admitted was considered fully qualified.

Thus the University of Washington Law School's minority policy was a moderate one, involving only distinctions of degree within an overall process characterized by subtle considerations of personal qualifications in every application.

ARGUMENT

I. THE APPLICABLE LAW: A TEST OF "REASONABLENESS"

A.

This Case Presents a New Issue in the Law of "Racial Classifications." A New Issue Should Be Considered Anew: Broad Language in Past Decisions Should Be Applied Only If It Is Applicable.

The University of Washington Law School admissions process takes cognizance of race. But this is no ordinary "race case." Indeed, in the common sense of the term, this is not a "race case" at all. This case, rather, presents an issue of first impression.

For years, the Court has interpreted the Constitution to condemn the longstanding subjugation of racial minorities in America. It has confronted countless racial classifications used to perpeutate that heritage. But it has almost never confronted a classification used for just the *opposite* purpose. For the first time now the Court faces a voluntarily-adopted process attacked as favoring, rather than harming, a racial minority; a process used to bring the races together, not to set them apart; a process designed, most importantly, to remedy the present effects of past discrimination, not to further entrench them.

To be sure, many of this Court's past decisions have condemned "racial classifications," and even presumed them unconstitutional, in very general terms.[7] But that sweeping language should not be applied in this

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[7] As early as 1896, for example, the Court said that "the Constitution of the United States . . . forbids . . . discrimination by the General Government, or by the States, against any citizen because of his race." *Gibson* v. *Mississippi*, 162 U.S. 565, 591. And, in dissent in a contemporary case, Justice Harlan insisted that the Constitution is "colorblind." *Plessy* v. *Ferguson*, 163 U.S. 537, 552. Such language might appear on its face to condemn

case if it is not applicable in the changed circumstances here. This point was overlooked by both of the courts below.

Both courts read the broad language in past decisions to require inevitably that any and all consideration of race be presumed unconstitutional. The King County Superior Court flatly held that no racial classification can ever be constitutional. "[T]he Fourteenth Amendment [can] no longer be stretched," it said, "to accommodate the needs of any race." Unreported opinion quoted in *DeFunis* v. *Odegaard,* 507 P.2d 1169, 1178. The Washington Supreme Court properly rejected the idea that consideration of race is unconstitutional *per se.*[8] *Id.* at 1179-1181. But it read language in past decisions holding "racial classifications" presumptively unconstitutional to apply to all racial classifications. It reversed the decision of the Superior Court only by holding that the pre-

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all racial classifications, of whatever type, used for whatever purpose.

More recently, using no less sweeping language, the Court has subjected racial classifications to a test with extraordinary force At first, under the Due Process Clause, it stated that "all legal restrictions which curtail the civil rights of a single racial group are immeliately suspect . . . [and] courts must subject them to the most rigid scrutiny." *Korematsu* v. *United States,* 323 U.S. 214, 216. See also *Bolling* v. *Sharp,* 347 U.S. 497, 498. Then, under the Equal Protection Clause, the Court stated that "racial classifications [are] 'constitutionally suspect' " and are permissible only if they are shown to be "necessary" for some "overriding purpose." *McLaughlin* v. *Florida,* 379 U.S. 184, 192, 196. See also *Loving* v. *Virginia,* 388 U.S. 1, 10-11.

[8] The Court has explicitly stated that racial classifications are *not* unconstitutional *per se. Hirabayashi* v. *United States,* 320 U.S. 81, 100; *Korematsu* v. *United States,* 323 U.S. 314, 216, 223. See *McLaughlin* v. *Florida,* 379 U.S. 184, 196; *Loving* v. *Virginia,* 388 U.S. 1, 11. See also *Lee* v. *Washington,* 390 U.S. 333.

sumption could be overcome in this case by a "compelling" justification. *Id.* at 1181-1185.

Both courts erred in their over-reading of the law. Broad language in past opinions need not necessarily govern decision in another case, with substantially different facts. See, e.g., *Kirby* v. *Illinois,* 406 U.S. 682. Holdings are holdings; dicta are dicta; and the two must be distinguished. Or so this Court has always said. See, e.g., *Harris* v. *New York,* 401 U.S. 222, 224.

Thus it is not *inevitable* that all consideration of race must be treated as the same.[9] It is not inevitable that all "racial classifications" must be treated as "suspect" or presumed unconstitutional. A new type of racial classification, different from those considered in the past, used for a different purpose to deal with a different set of practical difficulties, requires new consideration under the language of the Constitution, not simply under the language of previous court decisions.

The seductive power of sweeping words crafted for particular situations is no doubt great. As Mr. Justice Cardozo emphasized in a biting criticism of Fourteenth Amendment interpretation in the heyday of "substantive due process," it is a seduction that can lead courts astray. "Out of the vague precepts of the Fourteenth Amendment," Cardozo wrote, "a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Snyder* v. *Massachusetts,* 291 U.S. 97, 114. This seduction can be resisted in the present

[9] It is pointed out in Section "D" below that the Court has *not* treated all racial classifications as the same or subjected them all to review as "suspect" classifications.

case if it is recalled that: "Equal protection, not color blindness, is the constitutional mandate, and the experience with liberty of contract should caution against an absolute legal criterion that ignores practical realities." Freund, *Constitutional Dilemmas,* 45 B.U.L. Rev. 13, 20.

The practical reality of this case is that race was considered by the Law School not to reinforce the heritage of discrimination, but to remedy its debilitating effects. The Fourteenth Amendment is designed to root out just that heritage. It is not designed to frustrate reasonable efforts, by other governmental bodies, to do the same.

An inquiry into the *limitations* of past decisions, remarkable for their apparent breadth, is therefore, in order.

B.

The Key to the Past Cases, In Which the Court Has Struck Down Racial Classifications and Presumed Them Unconstitutional, Has Been an Element of Inferior Treatment or Stigmatization of a Racial Minority by the Majority. The Sweep of Those Decisions, Therefore, Is of Limited Scope—Falling Short of the Present Case.

The racial classifications, which the Court has held unconstitutional in the past, have shared one characteristic: they were classifications used to stigmatize or accord inferior treatment to racial minorities,[10]

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[10] The term minority is used here, and throughout the rest of this brief, as a term of art. It denotes more than a mere "numerical minority." For a racial group with a numerical majority in a particular area may nonetheless be a "functional minority." It, in other words, may have the functional attributes of the most isolated and victimized minority: it may be relatively powerless, subjected to past and present discrimination by those who hold power, and set apart both physically and psychologically. That, indeed, has long been the condition of the black "minority" in America—and no less so in areas where blacks were in a numerical majority. See footnote 18 below.

long subject to racial discrimination in America. The past cases, in other words, involved discrimination *against* already-victimized racial minorities.

These racial classifications, held unconstitutional, have been of three types. Progressively, in these cases, the element of inferior treatment or stigmatization of a racial minority has been less and less obvious on the surface. But, progressively, the Court has searched out that element beneath the surface and struck down the classifications.

(1) In many of the early cases, the inferior treatment of a racial minority was explicit and clear. E.g., *Strauder* v. *West Virginia,* 100 U.S. 303 (blacks forbidden to sit on juries); *Nixon* v. *Herndon,* 273 U.S. 536 (blacks barred from voting in Democratic primaries). See *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 198-199. In many other cases, it was less explicit, but no less clear. E.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356 (law enforcement directed solely against Chinese minority); *Guinn* v. *United States,* 238 U.S. 347 (literacy test for voting effectively applied only against blacks through a "grandfather clause"). The Court held that such inferior treatment of a racial minority was unconstitutional not only in itself, but also because it imposed a "brand upon them . . . an assertion of their inferiority." *Strauder* v. *West Virginia,* 100 U.S. 303, 308. See *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374.

The Court's earliest statement that racial classifications are "suspect" and subject to "rigid scrutiny" was worded generally, but came in a case of this kind: one that involved the most blatantly inferior treatment and stigmatization of a racial minority. *Korematsu* v. *United States,* 323 U.S. 214.

(2) State action designed to keep the races apart —to segregate them—was, for almost sixty years, left largely undisturbed on the ground that "separate but equal" treatment did not constitute inferior treatment of the racial minority.[11] E.g., *Plessy* v. *Ferguson,* 163 U.S. 537. But in *Brown* v. *Board of Education,* 347 U.S. 483, the Court brought segregated treatment within the ban on inferior treatment. It did so explicitly on the ground that segregated treatment *is* inferior treatment, and therefore unconstitutional. "Separate educational facilities," it said, "are inherently unequal." *Id.* at 495. And, again following the theory of the previous inferior treatment cases, it said: "To separate [black school children] . . . solely because of their race generates a feeling of inferiority as to their status in the community . . . [T]he policy of separating the races is usually interpreted as denoting the inferiority of the Negro group." *Id.* at 494.

It was in a case of this second sort that the Court next re-affirmed its earlier statement that racial classifications are "suspect" and subject to strict scrutiny. *Bolling* v. *Sharp,* 347 U.S. 497, 498. Again, this statement was worded generally. But, again, it came in a narrower context: *Bolling* was the companion case to *Brown,* concerning school segregation in Washington, D.C., and plainly involving the same elements of inferior treatment and stigmatization of the black minority.

(3) Finally, the Court has struck down racial classifications that involved inferior treatment or

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[11] But see *Buchanan* v. *Warley,* 245 U.S. 50 (striking down, under the due process clause, a zoning ordinance providing for the racial segregation of neighborhoods).

stigmatization of a racial minority that was neither patent on the surface nor accomplished through segregation. In these cases, the Court has at first struck down the classifications without reference to inferior treatment or stigmatization, and then later pointed out these subterranean, but essential, elements.

An early example was *Anderson* v. *Martin,* 375 U.S. 399. It dealt with a State statute requiring that a candidate's race, whether black or white, be printed by his name on the election ballot. The Court held the statute unconstitutional, stating generally that the state had no right to "encourage its voters to discriminate upon the grounds of race." *Id.* at 402. But, at one point in the opinion, it noted that the evil of the statute was that it specifically encouraged the racial majority in an election district to discriminate against the racial minority. *Id.*

The Court, in later cases of this type, has explicitly rationalized and followed *Anderson* as a case involving the encouragement of inferior treatment of a racial minority. In one instance, concerning a charter provision that required any fair housing ordinance to be approved by referendum, the Court held the provision unconstitutional and observed:

> "[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson* v. *Martin,* . . . [the law here] places special burdens on racial minorities . . . "

Hunter v. *Erickson,* 393 U.S. 385, 391. Thus, once again, the basis of the Court's decision—the inferior treatment or stigmatization of a racial minority—was clear. [12]

It was in cases of this kind that the Court first stated that racial classifications must be shown to be "necessary" to achieve an "overriding purpose." The first, *McLaughlin* v. *Florida,* 379 U.S. 184, concerned a statute forbidding inter-racial co-habitation. Its sequel, *Loving* v. *Virginia,* 388 U.S. 1, involved a law forbidding miscegenation. The co-habitation law was explained by the State as essential to enforcement of its miscegenation law; it did not patently involve inferior treatment of a racial minority as such, and it did not involve the inferior-treatment-through-segregation struck down in *Brown.* The *McLaughlin* Court held the law unconstitutional as "unnecessary" to achieve the proffered purpose, but it said nothing to identify the crucial element of stigmatization. Only when the Court struck down the anti-miscegenation law, in *Loving,* did it point to that element. For it then condemned such laws as "measures designed to maintain White Supremacy." 388 U.S. at 11.

A review of the Court's racial classification decisions, then, yields one conclusion: the sweeping doctrinal statements of hostility to "racial classifica-

[12] Significantly, in cases where the inferior treatment of a racial minority has not been shown, the Court has upheld State action challenged as discriminatory. Thus it upheld a requirement that all publicly financed low-cost housing projects be approved by referendum. It observed that the housing affected would not solely "be occupied by a racial minority," and it concluded that "the record [does not] . . . support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." *James* v. *Valtierra,* 402 U.S. 137, 141.

tions," putting them in a separate category under the Equal Protection Clause, have been crafted to deal only with classifications used to subject a racial minority to inferior treatment or stigmatization.

These doctrines, therefore, have no application to the present case. The University of Washington policy does not accord inferior treatment to racial minorities; rather, it is challenged as according them superior treatment. Nor does the University policy stigmatize the minorities.

There is some suggestion in an *amicus* brief submitted to this Court that the allegedly favored treatment given minority students might be regarded by some of them as "paternalistic" and thus stigmatizing. Brief of Anti-Defamation League of B'nai B'rith as *Amicus Curiae* in Support of Jurisdictional Statement, at 12. But there is absolutely nothing in the record to support such a conclusion; the *Amicus* admits that the "record is silent." *Id.* In fact, the record does not even hint at a basis for such a conclusion.[13]

The major premise of the University policy was that racial minorities were as deserving as anyone else of a good education and opportunity to assume important social roles in adult life.[14] That hardly amounts to a brand of inferiority. A minor premise of the University policy was that the minority students admitted, some with lower grades and scores but with motivation

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[13] Does the *amicus* seriously suggest that minority students would *prefer* to remain *excluded* from law school? The civil rights organizations, joining this brief, consider this "paternalism" argument to be itself highly patronizing and divorced from reality.

[14] St. 222-225

and abilities not embodied in numerical labels, could "move out of the University at the same level or degree that all other students do."[15] That hardly amounts to a brand of inferiority. To be sure, University officials felt privately that certain minority students may present more of a "risk" than others.[16] But they thought it was a risk worth taking, they saw a potential in those students for success in law school, a potential which others might have denied out of hand. That, again, hardly amounts to a brand of inferiority.

The assertion that the University's policy was "paternalistic" and 'stigmatizing" toward racial minorities is part of an effort to bring this case within the ambit of the past racial classification cases. But it is an effort that must fail so long as courts are able to tell actions that brand minorities as inferior from actions that deny such inferiority.

Because the element of inferior treatment or stigmatization of a racial minority, central to past holdings, is not present here, those holdings cannot be used to shift the presumption against the constitutionality of the racial classification in this case. But it remains to inquire *why* classifications should be presumed unconstitutional only if they so burden a minority group.

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[15] St. 242.

[16] St. 234, 418, 423.

C.

The Theory of "Suspectness," That Shifts the Presumption Against the Constitutionality of a Classification, Applies Only to Classifications Used To Burden "Insular" and Victimized Minorities. Thus the Classification in the Present Case, Not So Used, Should Not Be Presumed Unconstitutional.

Stepping back from past decisions on racial classification to the criteria for "suspectness" of classifications generally, the basis and limits of "strict" review under the Equal Protection Clause become clear.

Lists of the classifications that have been held "suspect," and presumed unconstitutional, often describe them in categorical terms. One list includes classifications "based on race" and "those based on national origin, alienage, indigency, or illegitimacy."[17] The description conveys the impression—shown above to be incorrect—that *all* racial classifications have been held "suspect," or that *all* classifications based on national origin, alienage, indigency or illegitimacy have been presumed unconstitutional.

In fact, the "suspectness" of a classification does not depend "per se" on the broad characteristic, such as race or alienage, used to distinguish people. Rather, it depends more narrowly on what group is disadvantaged by the classifications in question. A classification is "suspect" only if it is used to disadvantage "insular" and victimized minorities.

Last Term, the Court made this point and defined the criteria for "suspectness" quite plainly. In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, it set

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[17] *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 61 (Stewart, J., concurring).

out to determine whether the groups disadvantaged by a Texas school financing scheme were subjected to a "suspect" classification. It held that they were not. For, the Court said, the alleged discrimination had "none of the *traditional indicia of suspectness:* the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28 (emphasis added).

Why is a classification "suspect" only if it disadvantages a group subject to a history of discrimination or held down by special disabilities or political powerlessness? The answer lies in the history of the Fourteenth Amendment and in the American doctrine of judicial review.

First, there is no dispute that the central purpose of the framers of the Fourteenth Amendment was to give special protection to one particular group long subject to discrimination and every form of disability: blacks. As Professor Bickel has written: "Everyone's immediate preoccupation in the 39th Congress . . . was, of course, with the hardships being visited on the colored race." Bickel, *The Original Understanding and the Segregation Decision,* 69 Harv. L. Rev. 1, 60. For many years, this Court stated that special protection for blacks was the *only* purpose of the Equal Protection Clause. E.g., *Slaughter-House Cases,* 83 US. 36, 81; *Strauder* v. *West Virginia,* 100 U.S. 303, 306-307. Later, other purposes and applications were recognized; but special protection for the original disadvantaged minority remained the "central" purpose. Gradually, protection was extended to other victimized

groups in positions analogous to that of blacks. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374; *Oyama* v. *California,* 332 U.S. 633, 644-646. And discrimination against these groups was eventually treated as "suspect," because most clearly at odds with the main purpose of the Equal Protection Clause.

Thus when four Justices of this Court argued, last Term, that sex-based classifications are "suspect," their reasoning for the most part applied only to those sex-based classifications discriminating *against* women. The Justices clearly perceived the analogy to blacks as the historic basis of "suspectness." "[T]he position of women in our society was," they said, "in many respects comparable to that of blacks under the pre-Civil War slave codes." *Frontiero* v. *Richardson,* 411 U.S. 677, 685. They spoke of the Nation's "long and unfortunate history of sex discrimination . . . [that] put women, not on a pedestal, but in a cage." *Id.* And they emphasized that even today "women still face pervasive discrimination in our educational institutions, in the job market, and perhaps most conspicuously in the political arena." *Id.* at 685-686.

Second, a classification is "suspect" only if used to disadvantage a minority group,[18] saddled with a history of discrimination and special disabilities, because of our democratic doctrine of judicial review. Under this doctrine, courts generally presume the acts of other,

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[18] The four Justices arguing last Term that discrimination against women should be "suspect" recognized that women are not a numerical minority. They reasoned that, *functionally,* women are the equivalent of a relatively powerless minority group: "in part because of past discrimination, women are vastly under-represented in this Nation's decisionmaking councils." *Frontiero* v. *Richardson,* 411 U.S. 677, 686 n.17.

popularly controlled, bodies to be constitutional. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 Harv. L. Rev. 129. They do so because most groups, complaining of alleged discrimination, have ample access to the responsible governmental bodies and ample opportunity to defend themselves through the normal political processes. Yet that is not the case for "discrete and insular minorities"—particularly for minorities held down by disabilities resulting from a history of discrimination. When *they* are subjected to inferior treatment or stigmatization, it cannot be assumed that "the operation of those political processes ordinarily to be relied upon to protect minorities" provides an effective alternative to judicial review. Therefore, there is a "narrower scope for operation of the presumption of constitutionality." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153 n. 4.

Thus when the Court was asked to determine if classifications based on alienage were "suspect" and to be presumed unconstitutional, the Court did not hold that such classifications are "suspect" *per se.* Rather, it held that alienage classifications *that disadvantage aliens* are "suspect." It reasoned that aliens—like blacks—are entitled to special protection, because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson,* 403 U.S. 365, 372.

Conversely, when the Court was urged to apply the "strict" standard of review to a classification based on a particular age requirement, the Court refused to do so, with one opinion noting that the "establishment of an age qualification is not state action aimed at any

discrete and insular minority." *Oregon* v. *Mitchell*, 400 U.S. 112, 295 n.14.

In the present case, the groups that are allegedly disadvantaged by the challenged classification are *non*-minority groups. They are groups *not* subject to past discrimination, *not* saddled with disabilities, and *not* politically powerless. Special protection by the courts for them would hardly be within the central purpose of the Equal Protection Clause. Moreover, the American doctrine of judicial review assumes that they have ample opportunity to seek a change in the University policy through the legislative process—and, in Washington, the popularly elected legislature *would* have power to change that policy.[19] The Court, therefore, should leave intact the normal presumption that the policy is constitutional.

That the University policy, and similar racial classifications, are not to be presumed unconstitutional does *not* mean that they are automatically permissible. This Court no longer takes such a two-dimensional approach to the Equal Protection Clause. While, at one time, it seemed that "suspect" classifications were automatically invalid, and all others automatically valid, that time is over. The Court has given "bite" to the so-called "lenient" standard of review. See, e.g., *James* v. *Strange*, 407 U.S. 128; *Jackson* v. *Indiana*, 406 U.S. 715; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1. Thus non-"sus-

[19]Washington law provides: "Except as the legislature shall otherwise specifically direct, the board of regents and the board of trustees for the state universities and state colleges shall determine entrance requirements for their respective institutions of higher education." Wash. Code, 28B, 10.050.

pect" racial classifications that are unfair or irrelevant to a legitimate purpose will be subject to careful constitutional testing, without being presumed unconstitutional.

A holding that the University policy here is not "suspect," therefore, will not open any floodgates. It will simply draw a judicious line based on judicial restraint and strict construction of the Fourteenth Amendment —a line recognizing that there are limits to the extraordinary exercise of judicial intervention under the Equal Protection Clause, and that those limits are determined by the Clause's "central meaning."

D.

Racial Classifications Are Often Unfair and Irrelevant to Any Legitimate Purpose. But They Are Not Always So. Specifically, This Court Has Held That Racial Classifications Are Neither Unfair Nor Irrelevant—Nor Unconstitutional—When Used To Undo the Effects of Past Racial Discrimination.

Often, this Court has pointed out that distinguishing among people on the basis of race is usually both unfair and irrelevant. For to classify individuals by immutable characteristics—qualities they cannot change—violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175. See *Cassell* v. *Texas* 399 U.S. 282, 286. "[R]acial discriminations," the Court has said, "are in most circumstances irrelevant and therefore prohibited." *Hirabayashi* v. *United States*, 320 U.S. 81, 100. See *McLaughlin* v. *Florida*, 379 U.S. 184, 392; *id.* at 198 (Stewart, J., concurring). For those reasons, race-based classifications will very often be unconstitutional, even under a less

"strict" standard of review. But what is very often true is not always true.

The fact that a classification is very often unfair and very often irrelevant, taken alone, does not justify the drastic step of presuming it *always* unconstitutional. Nor does it mean that the classification will always be found unconstitutional under a less automatic test. There will still be cases in which the classification is neither unfair nor irrelevant; and it is the business of the courts to keep an open mind should such cases arise.

This Court has done so. Where no burden of inferior treatment or stigmatization is imposed on a racial minority, the Court has not employed "strict" review. And, where the classification has seemed both fair and well suited to a legitimate purpose, the Court has left it undisturbed. See, e.g., *Tancil* v. *Woolls*, 379 U.S. 19.[20]

Recently, the Court has held that racial classifications are permissible in one broad and important circumstance: when they are used to remedy the present effects of past racial discrimination. Cf. *Louisiana* v. *United States*, 380 U.S. 145, 154.

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[20] In *Tancil*, the Court affirmed a District Court holding that allowed a State to require every divorce decree to be labelled with the race of the parties. *Tancil* v. *Woolls*, 379 U.S. 19, *affirming* 230 F.Supp. 156. This recording requirement was found to be solely for "statistical" purposes. It probably could not have stood up against "strict" review, for a "statistical" purpose is hardly "overriding" or "compelling" in the usual sense. But "strict" review was not applied. The requirement was permissible because it imposed no burden of inferior treatment or stigmatization on any racial minority, and it did not seem either unfair or irrelevant to the State's statistical interest. See *McLaughlin* v. *Florida*, 379 U.S. 184, 198 (Stewart, J., concurring).

Two major decisions have concerned racial classifications used as a remedy for past racial segregation that had been held unconstitutional. Thus the Court upheld a District Court order requiring that public school teachers, once segregated, be reassigned on the basis of race so as to achieve a minimum ratio of white-to-black teachers in every school. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225. The Court did not treat this racial classification as "suspect" or apply "strict" review. Rather, it approved the classification, emphasizing the District Court's discretion, and noting only that the prescribed racial ratio should not be a rigid one. Later, the Court upheld an order designed to remedy past segregation of public school students by requiring that they be reassigned on the basis of race so as to achieve a satisfactory ratio of white-to-black students in every school. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1. Again, the Court did not treat the racial classification as "suspect" or subject it to "strict" review. Instead, it approved the classification, again emphasizing the District Court's broad discretion, and saying that the use of racial ratios was a proper "starting" point in the process of shaping a "remedy" for past school segregation. *Id.* at 25.

These decisions establish three principles that support the constitutionality of the University of Washington policy at issue in the present case.

First, they establish that a racial classification used to undo the effects of past discrimination is not to be presumed unconstitutional. For it does not burden—rather, it relieves the burdens of—a racial minority.

Second, they establish that such a classification is not unfair, even though based on the immutable trait

of race. For the wrong to be remedied—racial discrimination—itself defined the injured class by that trait.

Third, these decisions establish that such a racial classification is not irrelevant. What could be *more* relevant to undo the effects of discrimination against a racial group than a remedy directed to that same group?

This Court's approval of remedial racial classifications, then, is based on a principle of realism. One might hope that the work of the Fourteenth Amendment could be done simply by forbidding discrimination. But the Court has recognized that, in the real world, the scars of past discrimination have gone too deep; and racially "neutral" remedies for discrimination are too often ineffective. See *Green* v. *County School Board,* 391 U.S. 430; *Monroe* v. *Board of Commissioners,* 391 U.S. 450. Lower courts have come to understand and adopt this policy of realism. Colorblindness "has come to represent a long-term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term." *Associated General Contractors of Massachusetts* v. *Altshuler,* 42 U.S.L.W. 2320 (CA 1). For now, the Constitution must be "color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 876 (CA 5).

E.

The Use of Racial Classifications To Remedy the Effects of Past Discrimination Is Permissible Not Only as a Coercive Remedy of Federal Courts, or the Federal Congress or the Federal Executive. It Is Also Permissible as a Voluntary Remedy Adopted by State Governmental Bodies—Including State Universities.

The principles enunciated by this Court in the *Montgomery County* and *Swann* decisions have proved fertile. In those two cases, the use of racial classifications to remedy the effects of past discrimination was (1) by a court order, (2) after a judicial finding of past *de jure* discrimination, (3) that was held to be unconstitutional. But other governmental bodies— the federal courts, the Congress, the federal Executive, local school authorities and, in this case, a State University—now are using the same remedial tool in other fashions and in other contexts. Consistently, the constitutionality of their efforts has been upheld.

The major federal uses of remedial racial classifications, that have been tested constitutionally, are under Title VII of the Civil Rights Act of 1964,[21] guaranteeing equality of employment opportunity, and under Executive Order 11246,[22] requiring federal contractors to take "affirmative action" to recruit and employ racial minorities. Pursuant to Title VII, courts have held that it is constitutional to order hiring of workers on a racial-ratio basis. E.g., *Heat and Frost Workers, Local 53* v. *Vogler,* 407 F.2d 1047 (CA 5); *United States* v. *Sheet Metal Workers International Ass'n, Local No. 36,* 416 F.2d 123 (CA 8); *United States* v. *Iron Workers Local 86,* 443 F.3d 544 (CA 3), *cert.*

[21] 42 U.S.C. 2000(e).

[22] 30 F.R. 12319, as amended, 32 F.R. 14303; 34 F.R. 12985.

denied, 404 U.S. 984; *United States* v. *Wood, Wire, and Metal Lathers Internatoinal Union, Local No. 46,* 471 F.2d 408 (CA 2), *cert. denied,* 41 U.S.L.W. 3645; *United States* v. *Local Union No. 212, Int'l Brotherhood of Electrical Workers,* 472 F.2d 634 (CA 6); *Stamps* v. *Detroit Edison Co.,* 42 U.S.L.W. 2200 (E.D. Mich.). Pursuant to Executive Order 11246, courts have held that it is constitutional to require "affirmative action" in the form of specific percentage goals and timetables for hiring of racial minorities. E.g., *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (CA 3), *cert. denied,* 404 U.S. 854; *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (CA 7); *Joyce* v. *McCrane,* 320 F.Supp. 1284 (D.N.J.); *Weiner* v. *Cuyahoga Community College District,* 19 Ohio St.2d 35, 249 N.E.2d 907, 908. Moreover, courts have upheld the constitutionality of orders, under the Fourteenth Amendment itself, requiring State or local governmental bodies to use a form of racial preference in hiring. *Carter* v. *Gallagher,* 452 F.2d 315 (CA 8), *cert. denied,* 406 U.S. 950; *Castro* v. *Beecher,* 459 F.2d 725 (CA 1); *NAACP* v. *Allen,* 340 F.Supp. 703 (N.D. Ala.); *Officers for Justice* v. *Civil Service Comm. of San Francisco,* 42 U.S.L.W. 2308 (D.N. Cal.).

These federal uses of remedial racial classifications, unanimously held constitutional, follow the principles announced in *Montgomery County* and *Swann;* but they have taken substantially different forms. (1) The racial ratios ordered for hiring under Title VII and the Fourteenth Amendment have been initially framed by a court, as in *Montgomery County* and *Swann.* The race-based "goals and timetables" under Executive Order 11246, however, have been initially framed by

Executive officials. (2) Like the racial classifications in *Montgomery County* and *Swann,* the ratios under Title VII and the Fourteenth Amendment have been ordered after a judicial inquiry into past hiring practices by the specific company, union or governmental body in question. But it has been held that this specific inquiry need not turn up past, purposeful discrimination by the employer or union; a mere showing of imbalance between the numbers of racial minorities available for work and the numbers hired in the past establishes a "prima facie" basis for a remedial order. See *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 551; *Castro* v. *Beecher,* 459 F.2d 725, 735. And the general requirement of "goals and timetables" under the Executive Order is applicable to *all* federal contractors, without any specific finding of their own past discrimination. (3) Finally, unlike *Montgomery County* and *Swann,* the racial classifications under Title VII and the Executive Order are ordered without any holding that the company or union in question has committed any *unconstitutional* act in the past.

These uses of remedial racial classifications by the federal government—allowed such breadth and flexibility by the courts—have, however, shared one overriding characteristic with the classifications upheld in *Montgomery County* and *Swann:* they have been coercive, extending federal power into the states. At issue in this case, on the other hand, is whether a State governmental body may *voluntarily* adopt a similar remedial policy. The question almost answers itself. In our federal system, State and local agencies must be allowed at least as much, and probably more, leeway to fashion their own remedies for the lingering disease of racial discrimination and its aftereffects. See *Younger* v. *Harris,* 401 U.S. 37.

In fact, this Court has already indicated very clearly that State and local bodies *do* have a broad and flexible power to seek equal opportunity through the use of remedial racial classifications. The Court has said that this power is much broader and more flexible than that of courts acting alone, as in *Montgomery County* and *Swann*. The Court spoke particularly of school authorities' voluntary efforts to undo *de facto* school segregation, but its comments apply more broadly:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary power of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court."

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16.

In this statement, the Court resolved three questions that arise in the present case. (1) State or local school authorities may act alone to use racial classifications designed to bring the races together. No court order is necessary. (2) State or local school authorities may act without any prior finding, judicial or otherwise, that they, specifically, have purposefully discriminated in the past. It is enough if they are acting to correct a mere racial imbalance. (3) And, finally, the condition they are seeking to cure through use of a remedial racial classification need *not* itself be unconstitutional.

The Court's resolution of these questions is consistent with decisions by every court to face the issue that State and local school officials are permitted by the Constitution to act on their own, using remedial racial classifications, to undo *de facto* school segregation. E.g., *Offermann* v. *Nitkowski*, 378 F.2d 22 (CA 2); *Wanner* v. *County School Board*, 357 F.2d 452 (CA 4); *Springfield School Committee* v. *Barksdale*, 348 F.2d 261 (CA 1); *Fuller* v. *Volk*, 250 F.Supp. 81 (D.N.J.); *Tometz* v. *Board of Education*, 39 Ill.2d 593, 237 N.E.2d 498; *Morean* v. *Board of Education*, 42 N.J. 237, 200 A.2d 97; *Addabbo* v. *Donovan*, 16 N.Y.2d 619, 209 N.E.2d 112. It is also consistent with court decisions upholding the constitutional power of a State government, *Associated General Contractors of Massachusetts* v. *Altshuler*, 42 U.S.L.W. 2320, and of local school authorities, *Porcelli* v. *Titus*, 431 F.2d 1254 (CA 3); but cf. *Anderson* v. *San Francisco Unified School District*, 357 F.Supp. 248 (N.D.Cal.), to undo past racial imbalance in employment by mandating racial hiring ratios.

Clearly, then, the Court has given high priority to the value of State and local freedom to use remedial racial classifications, when their purpose is to achieve equal opportunity for long-suppressed racial minorities. Its emphasis on the "discretionary powers" of these authorities to "formulate and implement" their own "educational policy" in this area goes far to support the "educational policy" of the University of Washington in the present case.

F.

It Now Being Clear That Remedial Racial Classifications Are Not To Be Presumed Unconstitutional, That Indeed They Are Broadly Permissible, and That Their Voluntary Use Is Not Confined Within Inflexible Bounds, the Racial Classification in the Present Case Should Be Permitted, Unless Shown To Be "Unreasonable" in Initiation or Scope.

What are the boundaries of the "discretionary powers" of school authorities—here, a State University—to "formulate and implement" their "educational policy" through use of a remedial racial classification? Because it is the exercise of "discretionary powers" that is involved, and because remedial racial classifications are not presumed unconstitutional, a "strict" requirement of "necessity" and "compelling" justification would be inappropriate.[23] But, because

[23] This is not to suggest that the Law School's admissions process could not pass such "strict" scrutiny. To the contrary, it seems clear—given the purpose of the Fourteenth Amendment—that efforts to remedy past discrimination and to bring the races together are in service of a "compelling interest." What could be a more "compelling" purpose, under the Amendment, than to set out to achieve exactly what the Amendment itself was meant to achieve?

There is, moreover, no "less onerous alternative" to the Law School's minority policy. An effort to seek only "disadvantaged" minority students, rather than minority students generally, would be impossible to administer and would not solve the problem of exclusion of all minority students, "disadvantaged" and non-"disadvantaged" alike, from the School in the past. See pages 59-60 below. Mere reliance on "compensatory education" programs at the primary and secondary school levels to solve the problem would be even more inadequate. Such "compensatory education" programs are useful, but they are not yet anywhere near perfect; by themselves, they cannot heal the scars left by discrimination on the present generation of minority children; and, in any event, they offer nothing at all to those minority youths who have already graduated from secondary school without such help.

there are inherent dangers of excess in the use of any racial classification, the usual test of mere "rationality" may be too weak.

A test for a voluntary, remedial racial classification should be designed to deal with the danger of excess. A remedial classification, used to deal reasonably with a real problem in a moderated fashion, presents little danger. But a classification used for no reason or hardened into a rigid "quota," could needlessly prejudice the opportunities of non-minorities.

A proper test will be both flexible enough to honor the right of school authorities to adapt a remedial policy to their own perception of a particular problem, yet not so flexible as to allow establishment of a "reverse racism." The basis for such a test is familiar to every court: it is the test of reasonableness. Remedial racial classifications—including that of the University of Washington Law School—should be permitted unless shown to be unreasonable in initiation or scope.

II. APPLICATION OF THE LAW: THE REASONABLENESS OF THE LAW SCHOOL'S ADMISSIONS PROCESS

A.

The University of Washington's Decision To Initiate a Policy of Seeking More Than a Token Number of Minority Students Was Not Unreasonable.

The reasonableness of the University's decision to seek more minority students may be tested in three separate respects: Was the decision based on a reasonable perception of a real problem to be remedied? Was the policy reasonably designed to remedy it? Was the University's decision within reasonable limits of the

broad "educational policy" that a University is entitled to choose for itself?

The immediate problem that the University's policy was designed to solve was the mere token presence of minority students on its campus. The University President, Charles Odegaard, testified that he initiated a study of this question after he saw "so few" black students graduating from the University at its 1963 Commencement exercises. (St. 222-223.) The study, by a faculty committee, was hardly precipitate. It lasted almost two years. In 1965, it resulted in a formal report focusing on the very small numbers of minority students at the University and recommending the sort of affirmative policy that was later adopted to seek more minority students. (St. 223-227.) When the University Law School applied this policy to its admission process, it, too, focused on applicants from minority groups that had sent no more than a few students to the School in the past. (St. 352.)

The University policy, however, was not designed only to deal with this immediate problem. University authorities saw the near-absence of minority students on their campus as part of a broader problem. President Odegaard defined it as the need of minority groups to "acquire the kind of educational background required for many of the roles in society." (St. 223.) The Law School Dean, Richard Roddis, saw the need for a "policy of paramount social importance on a national and state level to rapidly increase the participation and representation of people from these [minority] groups in the [legal] profession." (St. 419.)

There is nothing, in the record in this case or outside it, to suggest that the University's perception of these problems was not reasonable—or that the policy it adopted, affirmatively to seek more minority students, was not reasonably designed to remedy them.

At trial, the Petitioner did not even attempt to contest the University faculty committee's finding that no more than a few minority students were being admitted under the old admissions system. Certainly, that finding, as applied to the Law School, is entirely consistent with contemporary national findings. In 1965, the year this University's committee issued its report, the American Association of Law Schools also issued a report on the same problem, though confined to one minority: blacks. It found that there were only about 700 blacks in America's 150 law schools. About half of them were in 5 largely black law schools. Thus blacks represented only about 1.3% of all law students, and less than 1% in the non-black schools. 1 *1965 Proc. AALS* 172.

The Petitioner also did not attempt to challenge the University's perception of the broader problem it meant to remedy—the extreme scarcity of racial minorities in important professions, and particularly the legal profession. Since the time of Alexis de'Toqueville, the extraordinary importance of lawyers in America has been universally recognized.[24] Yet studies conducted during the 1960's found that "[w]hereas about one American in 625 becomes a lawyer, only one in 7,100 Negroes choose the law . . . Negroes constitute 12% of the nation's population, yet comprise less than one

[24] 1. A. deTouqueville, *Democracy in America* 282-290 (Vintage ed.)

percent of the legal profession." [25] Available statistics indicate that other minority groups, such as Indians and Chicanos, have even fewer of their own in the legal profession.[26] And, while figures for the State of Washington are harder to come by, it is known that, as of 1970, the State had only 20 black lawyers. 116 Cong.

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[25] Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073. In the greatest American cities, the mere token representation of blacks in the legal profession is astounding. Hearings on white collar employment, held in New York City by the Equal Employment Opportunity Commission in 1968, for example, revealed that of the 26 major industry groups in the city, law firms ranked next to last in black participation. Seven percent of white collar workers employed by banks were black; only 1.4% of those employed by law firms were black. In 1967, the 30 largest New York City firms employed three black attorneys among them. Among Chicago's seven largest firms, only one black attorney was employed in 1967, while the ten largest Washington, D.C. firms and the two largest Boston firms employed no black attorneys. Brown, *Racial Discrimination in the Legal Profession*, 53 J. of Am. Jud. Soc. 385.

A 1971 survey of 44 Midwestern law firms showed that only .08% of the firms' partners and only 1.2% of their associates were black. Edwards, *A New Role for the Black Law Graduate*, 2 Black L.J. 21, 34, 38, 40.

[26] A State with one of the largest Spanish-American populations is California. Spanish-Americans make up 11% of Californians; but less than 1% of California's lawyers are Spanish-American. California State Department of Finance, Provisional Estimate of Racial and Ethnic Composition of California, July 1966 & July 1967; Northern California Legal Director (1968); Southern California Legal Directory (1968).

A city with a large Chicano population—9% of total population—is Denver. Yet only .05% of the city's attorneys are classified as Chicano. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U.Tol.L.Rev. 281.

Arizona, New Mexico and Utah have almost 135,000 American Indian residents. But, as of 1968, there was not even one Indian practicing law in the first two of these states. University of New Mexico, *Special Scholarship Program for American Indians* (Brochure), at 4.

Rec.E. 7996 (daily ed., Sept. 2, 1970). One estimate is that there now is one white lawyer for every 720 whites in the State; but there is only one black lawyer for every 4,195 blacks, one Indian lawyer for every 6,677 Indians, and at most one Mexican-American lawyer for every 35,367 Mexican-Americans.[27]

Just as the Petitioner has not challenged the reasonableness of the University's perception of the problems it sought to remedy, so he also has not suggested that the "discretionary" policy it adopted to seek more minority students was not reasonably adapted to the purpose. Plainly, if there are very few minority students admitted to law school and graduating into the legal profession under an admissions system that emphasizes one set of factors, a more "discretionary" policy looking also to other indications of individual potential of minority applicants is well designed to remedy the problem.

During the same period in the late 1960's that the University of Washington was initiating such a policy, "many, possibly a majority" of other law schools took the same step.[28] Moreover, several "sponsoring organizations"—including the American Bar Association and the Association of American Law Schools—joined, on a national level, to form the Council on Legal Education Opportunity at about the same time. (St. 121-122.) The Council sought to aid law schools, in their

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[27] Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard*, 49 Wash.L.Rev. 1, 38.

[28] Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U.Tol.L.Rev. 321, 326 n.11.

"discretionary" efforts to identify minority applicants with special potential, by establishing six-week summer institutes for such applicants and then giving special scholarship support to "those who successfully complete the summer institute and who do then choose to go on to law school." (St. 123-124.) Thus the University of Washington was far from the only institution in America to decide that affirmative efforts were needed if it was to bring minorities into the legal profession through the law school admissions process.

Certainly, such a decision was well within reasonable bounds of the Law School's "broad discretionary power" to determine its own "educational policy." A law school's educational concerns have never been confined—and, clearly, the Constitution does not confine them—to a narrow focus on teaching and testing. As this Court recognized long ago, a "law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt* v. *Painter*, 339 U.S. 629, 634. Thus, even in a narrow educational sense, a law school has an important interest in the variety of its student body. The University of Washington acted in this interest, out of concern for its "educational environment." (St. 418.) Such action is entirely common, as President Odegaard testified:

> "It is a very common thing in higher education . . . for universities to regard a mix of students from many areas as preferable to a parochial group, and this is a very common policy throughout the nation. . . . Students obviously learn from students, as well as from their immediate instructors, and this, therefore, enriches their own educational opportunity."

(St. 218.)

Moreover, the boundaries of a law school's "broad discretionary power" over its "educational policy" extend beyond the immediate educational environment to the contribution it is making to society, through its graduates. A law school, particularly, cannot ignore the fact that its admissions decisions, as well as the type of education that it provides, will have an impact on the country. Only an irresponsible school would not take this fact into account; the University did take it into account.

On this record, then, the reasonableness of the University's decision to initiate its minority policy has not been shaken. Indeed, only one theory has been suggested—by an *Amicus* supporting the Petitioner's position—to attack that decision. The suggestion is that school authorities should be allowed to adopt a remedial policy toward racial minorities only if they have themselves engaged in "prior discrimination" against such minorities, or if their remedial policy "deprives" no one else of opportunities previously enjoyed. Brief of Anti-Defamation League of B'nai B'rith as *Amicus Curiae* in Support of Jurisdictional Statement, at 16.

This proposed limit on the voluntary action of State and local authorities has no basis in the law. Indeed, the law has already gone well beyond such rigid constraints.

First, there is no requirement that a State or local body taking remedial racial action must do so without "depriving" anyone else of accustomed opportunities. Our heritage of racial discrimination has not only harmed minorities; it has also benefitted certain other groups. A remedy for the harm will often inevitably

reduce some of the accustomed benefits. Even the racial ratios approved for school assignment in the *Montgomery County* and *Swann* decisions had this effect. The mandatory assignment ratios "deprived" whites of certain benefits, forcing them to leave schools that they liked, often closer to home. Blacks sought the re-assignments; they preferred to go to other schools. Whites preferred to stay where they were; yet they were moved. School re-assignment by school boards to remedy *de facto* segregation has the same "deprivation" effect on whites. No doubt, many of the white teachers and students who are re-assigned have not committed any discriminatory act. But, in the real world, there often is no way to remedy a long-established discriminatory system of distributing benefits and burdens without "depriving" someone of some benefits at least on a short term basis.[29] Neither this Court nor any court has let this fact of life stop remedial efforts.

Second, there is no requirement that a State or local body using a remedial racial classification show that it, specifically, has discriminated against minorities in the past. The countless court decisions unanimously upholding the authority of local school boards to undo past *de facto* school segregation have made this clear. See cases cited on page 45 above. *De Facto* school segregation, by definition, need not be the result of specific discrimination by the school board. Rather, it is the result of discrimination by others—for example, in

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[29] It should be noted that the Petitioner, DeFunis was *not* "deprived" of a legal education. DeFunis was denied the opportunity to study law at one particular University; but, for two years in a row, he was offered admission to other law schools, both in his home State and outside it.

the sale or rental of housing—and of the myriad debilitating effects of such discrimination that reinforce segregated housing and therefore school enrollment patterns. This Court has itself stated clearly that school boards are entitled to use remedial racial classifications to undo such *de facto* segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16.

The remedial action that the University of Washington Law School voluntarily took in the present case is quite similar to voluntary action by school boards to remedy *de facto* school segregation. Accordingly, it should not be subjected to more rigid limitations.

To be sure, the record in this case gives some indication that this University once engaged in specific, purposeful discrimination against minority students. President Odegaard testified that, in 1958, "there were references . . . to racial [discrimination]" at the University. (St. 221.) But, in a later exchange at trial, he mentioned no such discrimination:

> "Q—There never was a policy to keep minority students out [of] there, at any time?
> A—[by President Odegaard] There was no policy to keep students out. It was a form of operation at the University that obviously, some way or another, detracted from the minorities that came."

(St. 240-241.) The problem thus was one of past *de facto* non-admittance of minority students, due to general "cultural conditions" (St. 223-224.)—i.e., due to pervasive racial discrimination in the society that limited access by minority youths to the kind of preparatory education and other opportunities that facilitated admission to the Law School.

Of course, it is easier to identify and assess the *de facto* segregation of a school district than the *de facto* exclusion of minorities from a law school or the legal profession. A school district has a given "pool" of school children; the imbalance from school to school can be quickly calculated. A law school draws its students from a much larger "pool," of vaguer dimensions. *De facto* exclusion of minority students cannot usually be calculated accurately from the percentage of minority population in any specific geographical area, if the school draws students from many areas. Nor can it be easily calculated just by looking at the number of actual applicants and their races. For social, economic, and cultural conditions, related to past discrimination, may keep many even from applying.

The University of Washington Law School has chosen to be a "national law school." (St. 405.) It draws applications from around the country; almost half of the applicants to whom it offered admission in 1971 were from out of state. (St. 216) Thus the "pool" of minority students who may have been excluded from the Law School in the past should be measured on a national scale.

Perhaps no precise measurement is possible. But this Court has recognized that racial discrimination is a national "evil . . . which in varying degrees manifests itself in every part of the country." *Oregon* v. *Mitchell,* 400 U.S. 112, 284; *id.* at 133-134, 216, 235. More specifically, the Court has recognized that discrimination in primary and secondary education may result in later disadvantage to minorities when educationally-based tests are used to condition access to a benefit. See *South Carolina* v. *Katzenbach,* 383 U.S.

301, 327-334; *Gaston County* v. *United States,* 395 U.S. 285; *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430. This effect of past discrimination, the Court has said, is not confined to any one particular area where past inequality in education has been especially burdensome; rather, it may be felt throughout the country. *Oregon* v. *Mitchell,* 411 U.S. 112, 133, 216, 235, 283. Clearly, an effect of this general kind was felt at the University of Washington Law School and resulted in the exclusion of minority students.

The difficulty in assessing the extent of such *de facto* racial exclusion from law school might possibly deter a court from holding it unconstitutional, even if *de facto* segregation of public school districts is outlawed under the Fourteenth Amendment. See *Keyes* v. *Denver School District No. 1,* 413 U.S. 189, 217 (Powell, J., concurring). But a state of affairs that might discourage judicial interference with law school admissions policy need not also prevent the law school itself from revising that policy. "[A]bsent a finding of constitutional violation," a court may not order a remedy based on racial classification; but for school authorities "[t]o do this as an educational policy is within [their] . . . broad discretionary powers." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16.

B.

The Law School's Affirmative Policy To Seek Minority Students Was Not Unreasonable in Scope.

The reasonableness in scope of the Law School's minority admissions policy may be tested in three separate aspects: Was the Law School's choice of the minorities to be covered by the policy a reasonable one? Was the departure from normal procedures in the treatment of minority applications reasonably

limited? Was the end result, in terms of minority applicants admitted, reasonably consistent with the institutional mission of the Law School and with the interests of non-minority applicants?

The first of these questions is not involved in this case. The Petitioner did not claim, at trial, to be the member of any minority group that had been subject to *de facto* exclusion from the Law School, but that was not included in the School's affirmative admissions policy toward previously excluded minorities. Nor did the Petitioner present any evidence to suggest that there is any such previously excluded group, not covered by the Law School's policy.

The record is clear, however, on the standards used by the Law School to choose the minorities covered by the policy. The School focused on two factors: past, pervasive discrimination against the minority group and past absence of any more than a few students from the minority in the Law School. Its application of these standards is illustrated in its decision not to include Asian-American applicants under the affirmative policy. Asian-Americans were long subject to discrimination in the north-western States. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356. But, the Law School admissions committee found, a "significant number" of them were then being accepted through the ordinary process. Thus it concluded that their situation, at the time, was significantly different from that of blacks, Indians, Mexican-Americans and Philippine-Americans.[30] (St. 352.) Such a process for selecting the minorities to be sought was surely, on its face, a reasonable one.

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[30] We understand that, for the year 1974, Asian-Americans are being included as minorities for admissions purposes.

The Petitioner has suggested that the Law School should have singled out only minority applicants shown to be personally "disadvantaged" or "poor" or "culturally deprived." Petitioners' Opening Brief, at 10. This matter was brought up briefly at trial, when a member of the admissions committee was testifying, and it was established that the School had no information to apply these vague concepts in individual cases:

> "Q—Well, was there anything to show you that perhaps the Afro-American was—came from a very affluent family?
> A—There was no way of telling that."

(St. 262.)

Even if the School had attempted to define "disadvantage," "poverty" and "cultural deprivation," and even if it had required minority applicants to submit the extensive information needed to apply the definition, such a distinction would have been inappropriate. For it was the racial minorities generally—not just their "disadvantaged" or "poor" or "culturally deprived" members—that had suffered in the past from pervasive racial discrimination and *de facto* exclusion from the Law School and the legal profession, which were the problems the School sought to remedy. In that sense, all members of the minority groups were relevantly "disadvantaged" for the purposes of the University policy.[31]

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[31] There is, of course, no evidence whatever that the Petitioner, DeFunis, was himself disadvantaged in any way. "There is nothing in the record to show whether or not . . . DeFunis or any of the white applicants were in fact culturally disadvantaged, poor or discriminated against." Petitioners' Opening Brief, at 12.

The remedial racial classifications consistently upheld in the past have not distinguished between "poor" and "non-poor," or "culturally deprived" and "non-culturally deprived," members of racial minorities. Remedial hiring, on the basis of a racial ratio, ordered under Title VII of the 1964 Civil Rights Act has made no such distinction. See cases cited on pages 41-42 above. Nor have the "affirmative action" plans under Executive Order 11246. See cases cited on page 42 above. To be sure, the poverty or "cultural deprivation" of many members of racial minority groups has contributed to their past failure to gain admission to law schools and the legal profession and certain other kinds of employment. But these factors are too tightly connected to more than a century of racial discrimination to be easily separated out. The courts have upheld remedial racial classifications in the past because of that history, not because of sociological categories such as "poverty" or "cultural deprivation."

If the University did not act unreasonably, then, in selecting the minority groups covered by its affirmative policy, the question remains whether the policy itself was unreasonable in operation. In fact, it is the differential treatment of the minorities, not their selection, that the Petitioner is objecting to in this case.

It is true, of course, that minority applicants were not accepted or rejected solely on the basis of their college grades and L.S.A.T. scores. But neither were non-minority applicants. In the case of *every* applicant, the admissions committee looked beyond grades and scores for indications of special personal potential or motivation or background that might contribute to the law school community. In the case of *every* applicant, the committee examined the required letters of

personal recommendation and the optional personal statements submitted. See pages 15-18 above. In the case of *every* applicant—including the Petitioner—the committee, conducting a review of the files, gave special heed to evidence of personal character and experience. (St. 387.)

The "discretionary" admissions system, in other words, was applied to minority and non-minority applicant alike. The Petitioner is simply incorrect in representing that: "Of course all white students were subjected to the standardized mathematical criteria for admission." Petitioners' Opening Brief, at 16. *No* students were subjected to such "standardized" criteria.

The differential treatment accorded to minority applicants was only a matter of degree—within the "discretionary" system applied to all. The treatment was different in just two respects. First, somewhat more weight was given to non-grade-and-score factors in the applications from minority students. Second, as a matter of administration, all minority applications with a P.F.Y.A. below 77 were deferred for consideration in May, when they were first reviewed by committee members with unique knowledge of minority problems and then reviewed by the whole committee at a separate meeting.

These may seem to be stark differences in treatment, if viewed out of context. In the context of the overall "discretionary" admissions process, however, the differences blend into the background of multivarious factors considered in process, with varying weights inevitably attached to varying factors in varying cases. Many variables, if singled out and made the subject

of litigation, might seem to alter the overall process far more than they really do. For the goal of the process remained, whatever the varying weights given to different factors in different cases, the selection of a group of students qualified to study law and to contribute to both the law school community and the community at large.

Just as a school seeking football players, or musicians, or scientists, or students from different parts of the country—or sons and daughters of alumni—might look especially carefully at the applications of people with such backgrounds so the University of Washington Law School looked especially carefully at applications from minority students. Giving especially close attention to the applications of minority students, in fact, was *more* reasonable a measure than pursuing a similar policy towards football players or sons of alumni. For what set minorities apart for careful consideration was the fact that they had been largely missing in the past and that by seeking to admit more of them, the Law School could bring more heterogeneity to its "educational environment" and make a contribution to the racial problem plaguing America for decades.

Moreover, the attention given to non-grade-and-score factors for minority applicants—both in assigning such factors somewhat greater weight and in deferring all minority applications with P.F.Y.A.'s below 77 for separate consideration in May—contrasts less sharply with the attention given such factors for non-minority applicants when it is recognized that, for many minority students, pure grade-and-score factors may poorly reflect law school performance. The testimony on this point, at the trial of this case, was un-

contested. Professor Millard Ruud of the University of Texas Law School described a study that he had done for the Council of Trustees governing the Law School Aptitude Test. His study concluded that "with respect to minority groups" the L.S.A.T. was a more fallible predictor of law school achievement. Thus, he said, "there is a greater need [in their case] for exercise of judgment of looking at, examining the transcript, examining all the other data." (St. 129.) [32]

The Petitioner, in attacking the reasonableness of such subtle substantive and administrative balancing decisions by the Law School, is asking this Court to march into a bog from which it would not soon extricate itself. Even if the Court ordered all law schools everywhere to give substantially the same weight to all factors for minority and non-minority applicants, how could it ever police this principle? How could a law school be sure it was obeying the principle? Admissions committees, after all, do not use scales so precise that weights can be measured exactly. [33] Here, non-grade-and-score factors were given *some-*

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[32] There is, of course, much scholarly debate over the value of the L.S.A.T. as a predictor of law school performance. But the clear testimony of Professor Ruud stands unchallenged in this record. And, in any event, whether or not the L.S.A.T. predicts law school grades, there is no suggestion anywhere that it predicts one's performance *as a lawyer*. It is, after all, to train lawyers—not merely to grade students—that law schools exist.

[33] Moreover, it is not only the immediate balancing decisions by an admissions committee that affect the admissions process. Other factors enter in, such as the distribution of scholarship money or even the effort put out by a school to invite applications from—to recruit—certain types of students. Scholarship and recruiting decisions are no less subtle or important than immediate admissions decisions; but, presumably, the Petitioner would want this Court to impose rigid rules there as well.

what more weight for minority students. Was it too much more? How much more is too much? Surely, there is no constitutional rule that all law schools must base admissions decisions solely on college grades and L.S.A.T. scores, ignoring all indications of personal potential and motivation. Yet that is the only rule that would be at all workable if petitioner were to prevail.

In the present case, since the differential treatment was simply a matter of what weights were assigned to different factors in the decisionmaking process, the Petitioner has not succeeded in making a showing of unreasonableness. A court is well advised, in this instance, to defer to the experience of the school authorities. And, here, those authorities felt that they "already had enough experience to show that persons [from minority groups] who, on the basis of the conventional . . . aptitude tests or grades, may do rather poorly, actually, when admitted to the University . . . can and do make excellent records." (St. 234.)

It remains only to examine the reasonableness of the end result of the Law School's minority policy. If the Petitioner had shown that the School, in 1971, admitted a rigid "quota" of minority applicants or admitted actually "unqualified" minority applicants, this would be a difficult case. The School would be hard put to justify such a result as reasonably consistent with its institutional mission or with the legitimate interests of non-minority students. But the Petitioner did not make any such showing.

The most that the record reveals is that the Law School sought a "reasonable representation" of minority students—not a "quota." (St. 420.) Of course,

any affirmative policy, designed to undo the effects of past racial deprivations, must set some kind of goal for itself. In remedying racial imbalance in employment under Title VII of the 1964 Civil Rights Act, many courts have ordered specific numerical ratios for the future hiring of qualified blacks and whites. See cases cited on pages 41-42 above. The University of Washington, however, has not even set such ratios. Rather its goal of "reasonable" representation was both highly flexible and consistent with the overall "discretionary" nature of its admissions process.

Even more central to the reasonableness of the Law School's policy is the fact that it did not admit unqualified minority students at the expense of qualified non-minority students. The Dean of the Law School testified that "[w]e will go down to reach" a "reasonable" representation—i.e., "go down" in terms of taking some minority students who present a somewhat greater risk than others. But, he testified, "[w]e do not go down to the point of taking people that we think are unqualified, and that is an important point." (St. 420.)

The Petitioner did not successfully challenge this testimony. To be sure, it was shown that the admissions committee considered the applications of minority students at a separate meeting. (St. 351.) But the record is clear that the basic standard of qualification for law study applied at that meeting was the same as that applied at all the committee's other meetings. (St. 353, 399.) The Petitioner made much of the fact that some minority students admitted may have been "less" qualified than some others. (St. 245.) But, as every witness made clear, distinctions of degree above the basic standard of qualification—a reasonable likeli-

hood of success in law school—depend on subtle personal factors as well as grades and scores, and no one narrow definition of "more qualified" or "less qualified" is serviceable. (St. 73, 245, 353, 417-418, 423-424.) It can always be made to appear that, under one rigid criterion such as grades or test scores, "less qualified" applicants are admitted while "more qualified" applicants are rejected. But, when the essentially "discretionary" nature of the admissions process is recognized, distinctions blur and fall far short of invidious discrimination.

The Petitioner also made much at the trial of three specific minority students who were offered admission to the Law School in 1971. Each of the three had grades and scores substantially lower than the Petitioner's. But, as the Chairman of the admissions committee pointed out, these three individuals were all graduates of Council on Legal Education Opportunity summer institutes. (St. 397, 399.) They were called to the Law School's attention by the director of the institutes. (St. 411.) Thus the Law School had special information about their personal characteristics to weigh against their grades and scores. Whether, on the basis of that information, these three students were substantially "less qualified" for law study than others is hardly the clear-cut matter that the Petitioner seemed to suppose it was.

Naturally, the Law School's remedial racial policy had some costs for non-minority individuals. The class entering the School in 1971 included 18 minority students. While all of them were considered qualified for law study, some of them might not have been admitted if the School had concentrated less closely on their

non-grade-and-score qualifications. A few of the 1,300 other applicants, rejected in 1971, might have been admitted in their place.

By definition, any remedial policy, making adjustments in a system of distributing benefits, will somewhat improve the opportunities of those previously excluded and somewhat diminish the opportunities of those previously included in abundance. The question, always, is whether the adjustment is a reasonable one. We submit, in the present case, that it is.

CONCLUSION

What is so important about this case is not that the Petitioner is asking the Court to interfere with the discretionary admissions process of a law school. Rather it is that the Petitioner is asking the Court to cripple efforts in this country to exorcise, at long last, the effects of our heritage of racial discrimination.

The Court has long recognized that it is not enough simply to "bar . . . discrimination in the future;" it is also necessary "so far as possible [to] eliminate the discriminatory effects of the past." *Louisiana* v. *United States,* 380 U.S. 145, 154. The Court has also recognized that the chain-reaction of those discriminatory effects has gone both wide and deep. The establishment of a dual school system may affect voting opportunities. *Gaston County* v. *United States,* 395 U.S. 285. It may impose its burdens far into the future and far across the land. *Oregon* v. *Mitchell,* 400 U.S. 112, 133-134, 235, 283-284. Eliminating such encompassing injustices is a hard business; courts alone cannot do the job; other governmental bodies must do—and they have done—some part.

No doubt, it is tempting to some to believe that the job is over, that now we all can relax. The 1960's are behind us, to be sure. But the task we set for ourselves then will not be accomplished quickly; surely, it has not been accomplished yet. From the Congress to the Executive and down to smaller state institutions like the University of Washington Law School, Americans have grasped the tool of "affirmative action" and have been using it reasonably and effectively. The potential for real progress can now be seen.

The question here is whether the Court will now take that tool from the hands of those who have been using it for almost half a decade now. We urge the Court not to do so, and to let the progress along this historic path continue. Thus we urge that the judgment of the Supreme Court of Washington in this case be affirmed.

Respectfully submitted,

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